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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

AMENDMENT OF SECTION 73.202(b),  
TABLE OF ALLOTMENTS,  
FM BROADCAST STATIONS.  
(Berlin and North Conway, New Hampshire)

MM Docket No. 97-216  
RM-9153

To: The Chief,  
Allocations Branch,  
Policy and Rules Division,  
Mass Media Bureau

REPLY COMMENTS OF FULLER-JEFFREY RADIO OF NEW ENGLAND, INC.

Fuller-Jeffrey Radio of New England, Inc. ("Fuller-Jeffrey"), by its undersigned attorney and pursuant to Section 1.420 of the Commission's Rules, hereby respectfully submits these Reply Comments with respect to the Comments that were filed in the above-captioned proceeding by Tyler P. Harwell ("Harwell").

1. Harwell's Comments, although dated December 1, 1997, were received at the Commission on December 4, 1997. The Notice of Proposed Rule Making ("NPRM") in this proceeding, 62 Fed. Reg. 54819 (published on October 22, 1997), established that the date for

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filing comments in response to the NPRM was December 1, 1997.<sup>1/</sup> Harwell's Comments were thus filed three days out of time, and were not accompanied by a motion for leave to accept the untimely comments or any other acknowledgment of their lateness.

2. It is well settled that untimely-filed comments in a rule making proceeding involving the Table of Allotments for FM Broadcast Stations will be dismissed, unless there is no opposition to the proposal and there would be no adverse impact upon another pending proposal. Amor Family Broadcasting Group v. FCC, 918 F.2d 960 (D.C. Cir. 1990) (Court affirms Commission's rejection of comments in support of Notice of Proposed Rule Making that were filed one month late); Table of Allotments, FM Broadcast Stations (Hazlehurst and Bude, Mississippi), 10 FCC Rcd 2164 (Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau, 1995) (Commission staff rejects comments in support of Notice of Proposed Rule Making and associated expression of interest, filed six days late and accompanied by motion for leave to accept late-filed comments).

3. In the instant case, Harwell has not moved the Commission to accept his untimely Comments on a late-filed basis; indeed, Harwell has not even acknowledged the lateness of his Comments. Acceptance of his Comments would run counter to Commission policy as set forth in Amor and Hazlehurst and Bude, Mississippi, *supra*, because his Comments

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<sup>1/</sup> Fuller-Jeffrey timely filed Comments in support of the proposal set forth in the NPRM on December 1, 1997.

would have an adverse impact upon another pending proposal, namely, that set forth in the NPRM in this proceeding to amend Section 73.202(b) of the Commission's Rules by removing the allotment of Channel 279C from Berlin, New Hampshire to North Conway, New Hampshire and modifying Fuller-Jeffrey's license for WPKQ (FM) accordingly. Therefore, Harwell's Comments should be summarily dismissed and the Commission should proceed to act favorably upon the NPRM, there being no other comments responsive to the NPRM except those of Fuller-Jeffrey, note 1, *supra*, which fully support the proposal in the NPRM.

4. In the event that the Commission should have any concerns with respect to the allegations in Harwell's procedurally defective Comments, Fuller-Jeffrey wishes to assure the Commission that Harwell's factual allegations are as incorrect as his Comments are untimely. For example, Harwell alleges that . . . "[Fuller-Jeffrey] has ignored the programming needs of both Berlin, the existing community of license, and of the entire service area of Channel 279C." Harwell Comments, Para. 2. Harwell is egregiously wrong in that statement, as will be shown below, and should be reminded of the limits of responsible pleading before the Commission. *See, e.g.*, Section 1.52 of the Commission's Rules. <sup>2/</sup>

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Upon information and belief, Fuller-Jeffrey submits that Harwell is an attorney. He is listed as such in the Berlin, New Hampshire telephone directory. If he is not an attorney, then his Comments suffer from the additional disqualification of lacking a verification, in violation of Section 1.52 of the Rules. If he is an attorney, Section 1.52 specifically obligates him to have done a sufficient investigation to support his certification, in his signature on his Comments, that to the best of his knowledge,

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5. Fuller-Jeffrey acquired the license for WPKQ from the preceding owner of the station in late 1996 and -- except for a period during which the station was taken "dark" in order to effectuate badly needed equipment repairs -- Fuller-Jeffrey has endeavored both to ascertain the particular needs of the community of Berlin, the station's city of license, and to provide programming that addresses those needs. Fuller-Jeffrey has interviewed the Mayor and members of the City Council of Berlin and other community leaders, and those interviews have formed the basis of WPKQ's "Reporter's File" program, a weekly public-affairs show. Examples of programs that specifically targeted the community needs of Berlin and that were broadcast by WPKQ within the last year include a two-part interview with the mayor of Berlin, Dick Bosa, about the economy in that part of New Hampshire in which Berlin is located, known locally as the "North Country;" and a subsequent program featuring Mayor Bosa that focused on Berlin's 100<sup>th</sup> anniversary. WPKQ has also broadcast numerous announcements benefitting North Country community organizations, government agencies, and public service groups, including: the Mount Washington Valley Head Start program; the White Mountain National Forest Service; the New England Ice Racing Association; the Mount Washington Valley Economic Council; the Mount Washington Valley Chamber of Commerce; etc. WPKQ broadcasts nearly every hour of each day a "North Country Notebook" which identifies upcoming public service and community activities in Berlin and other communities within the station's service area. WPKQ's news

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2/ (...continued)

information, and belief, there are good grounds to support his Comments. As Fuller-Jeffrey shows hereinafter, it seems that Harwell's approach to his duty under Section 1.52 has been cavalier, to put it most kindly.

department regularly covers events of interest involving Berlin and the North Country in the station's daily newscasts, and presents a North Country weather report at least twice an hour during the entire broadcast day. Without further belaboring the point, suffice it to say that Harwell's conclusory attacks on WPKQ's programming are without factual foundation and represent a reprehensible form of baseless pleading that should not be countenanced by the Commission.

6. Matching his disrespect for the comments filing date and for the obligation to ensure the accuracy of his factual allegations is Harwell's disregard of the law. Harwell's Comments generally disparage the proposition that North Conway is a community entitled to an allotted channel, merely because it is a part of the Town of Conway: "North Conway is not a legally identifiable area and is merely the name given to the northern end of the Town of Conway." Harwell Comments, at Para. 4. It is well settled, however, that "... community status is presumed to exist if a community is incorporated or listed in the U.S. Census." Hazlehurst and Bude, Mississippi, supra. As the NPRM in this proceeding notes, North Conway is a Census Designated Place ("CDP") and is recognized by the U.S. Census Bureau as having a population of 2,032 persons. NPRM, at Para. 2. *See also* Table of Allotments, FM Broadcast Stations (Bear Creek and Pocono Pines, Pennsylvania), 12 FCC Rcd 10489 (Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau, 1997) (Commission staff allots FM radio broadcast station channel to Pocono Pines, Pennsylvania after finding that Pocono Pines, a CDP with a

listed population of 824 persons, qualifies as a "community" for channel allotment purposes). Fuller-Jeffrey stands behind the statements set forth in the Petition for Rule Making (the "Petition") that was filed with the Commission on April 25, 1997 by Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines ("FJBC"), Fuller-Jeffrey's predecessor as the licensee of WPKQ, which launched this proceeding, with respect to the status of North Conway as a community deserving of its own first local aural transmission service. Numerous businesses and residents in North Conway identify their locations as North Conway, both in their telephone directory listings and in their on-site signage; the community has its own zip code (03860); and the DeLorme Phone Search USA 3.0 CD-ROM (1997 edition), which lists telephone numbers by the communities in which the telephone subscribers are located, puts 1,002 residential and business telephone numbers in North Conway (along with 131 subscribers in Center Conway and 888 subscribers in Conway).

7. Given the presumption that as a CDP, North Conway is entitled to recognition as a community for channel allotment purposes, Harwell's harangue to the contrary is unavailing.<sup>3/</sup> He has offered little to rebut that presumption. While Harwell argues that ". . .

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It is telling to observe that none of the three radio stations licensed to Conway -- whose economic interests would seem to indicate a reason for opposing the NPRM's proposed allotment of Channel 279C to North Conway, if a legitimate basis for such an opposition were present -- have elected to associate themselves with Harwell or with the positions that he espouses. This, in spite of Harwell's attempt to invoke the interests of those three stations, *see, e.g.*, Harwell Comments at Para. 6, which is all

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the largest hospital in the area is the Androscoggin Valley Hospital in Berlin, the city the petitioner wishes to abandon as its community of license," Harwell Comments, at Para. 3, he has not refuted the statement in FJBC's Petition that the only hospital within the Town of Conway is in fact located in North Conway (the Androscoggin Valley Hospital is located in Coos County, while North Conway is in Carroll County). Though he disparages its significance, Harwell does not dispute the fact that "[a] municipal fire station is located in North Conway . . . ." Harwell Comments, at Para. 3. <sup>4/</sup>

8. The relationship of the CDP of North Conway to the Town of Conway is not dissimilar to other kinds of community formations in New England. For example, in the Town of York, Maine there are separate, smaller but identifiable, communities such as York Center, York Beach, York Harbor, and Cape Neddick. The fact that these smaller communities exist within the larger Town of York did not prevent the Commission from allotting a channel to one of them. *See, e.g., Table of Assignments, FM Broadcast Stations (York Center and Kennebunk, Maine), Report and Order in MM Docket No. 83-1064*, 1984 FCC LEXIS 2354

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3/ (...continued)

the more curious since -- as a resident of Berlin, some 35 miles away from Conway -- Harwell would not ordinarily be expected to be able reliably to receive the signals of those three stations (two of them being Class A FM radio stations with limited facilities and the third being an AM radio station with only 1,000 watts of power).

4/ Indeed, the quoted phrase appears to represent a concession on Harwell's part that North Conway exists.

(Chief, Policy and Rules Division, Broadcast Bureau, 1984) (Commission staff allots Channel 237A to York Center, Maine).

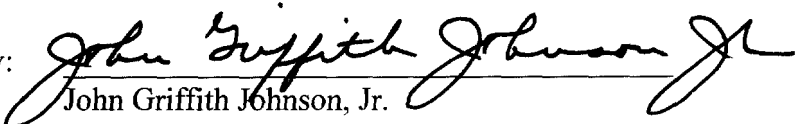
9. In conclusion, Harwell's disparagement of North Conway's entitlement to a channel allotment of its own runs counter to Commission case law, is unsupported by the facts, and flies in the face of precedents involving similarly-situated communities. The Commission need not dwell further on the rhetoric of a commentator whose submission is so thoroughly flawed.

WHEREFORE, the foregoing having been duly considered, Fuller-Jeffrey respectfully urges the Commission to dismiss Harwell's Comments as untimely filed, or -- in the alternative -- to reject the positions taken in Harwell's Comments as legally and factually unsupported and unsound, and to proceed as expeditiously as possible to adopt the proposal set forth in the NPRM in this proceeding as best serving the public interest.



Respectfully submitted,

**FULLER-JEFFREY RADIO OF NEW ENGLAND, INC.**

By:   
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December 16, 1997

## **APPENDIX**

Declaration of Martin R. Lessard  
Executive Vice President  
Fuller-Jeffrey Radio of New England, Inc.  
December 15, 1997

# DECLARATION

Martin R. Lessard hereby declares under penalty of perjury that he is the Executive Vice President of Fuller-Jeffrey Radio of New England, Inc.; that he has reviewed the foregoing Reply Comments of Fuller-Jeffrey Radio of New England, Inc.; and that except for those matters of which the Federal Communications Commission may take official notice, all statements of fact contained in the Reply Comments are true and correct to the best of his personal knowledge and belief.

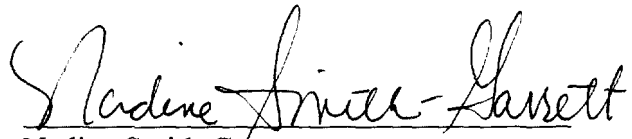
Executed in Dover, New Hampshire on December 15, 1997.

  
Martin R. Lessard

**CERTIFICATE OF SERVICE**

I, Nadine Smith-Garrett, a secretary in the law firm of Paul, Hastings, Janofsky & Walker LLP, do hereby certify that I have on this sixteenth day of December, 1997, mailed copies of the foregoing REPLY COMMENTS OF FULLER-JEFFREY RADIO OF NEW ENGLAND, INC. to the following by first-class United States mail, postage prepaid:

Tyler P. Harwell  
Post Office Box 314  
Berlin, New Hampshire 03570

  
Nadine Smith-Garrett